Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1675

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN J. CONFORTI, d/b/a C & C PRODUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

10 pp

QUESTION PRESENTED

Whether an agency adjudicator violated the Administrative Procedure Act or the Due Process Clause of the Fifth Amendment by taking official notice of facts established in another administrative proceeding, where the parties were given an opportunity to contest the officially noticed facts and substantial other evidence supported the adjudicator's findings.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Trucking Ass'ns v. *Frisco Transp. Co.*, 358 U.S. 133 (1958)	7, 10
Bowman Transp., Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974)	10
Dayco Corp. v. *FTC*, 362 F.2d 180 (6th Cir. 1966)	6
Hart v. *Commissioner*, 730 F.2d 1206 (8th Cir. 1984)	7
Landgraf v. *USI Film Prods.*, 114 S. Ct. 1483 (1994)	12
Liberty Mut. Ins. Co. v. *Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2d Cir. 1992)	6
M/V American Queen v. *San Diego Marine Constr. Corp.*, 708 F.2d 1483 (9th Cir. 1983)	6
Midland Banana & Tomato Co., In re, No. D-93-548 (Agric. July 26, 1994)	4
Pupillo v. *United States*, 755 F.2d 638 (8th Cir. 1985)	11
Richardson v. *Perales*, 402 U.S. 389 (1971)	5-6
Royal Fruit Co., In re, No. D-93-549 (Agric. July 26, 1994)	4
United States v. *Jackson*, 640 F.2d 614 (8th Cir.), cert. denied, 454 U.S. 1057 (1981)	7
United States v. *Pierce Auto Lines*, 327 U.S. 515 (1946)	7

Constitution, statutes and regulations: Page

U.S. Const. Amend. V (Due Process Clause) 5
Administrative Procedure Act, 5 U.S.C. 556(e) 4, 5, 9
Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 430 (to be codified at 7 U.S.C. 499a(b)(9)) 2, 11-12
Pershiable Agricultual Commodities Act of 1930, 7 U.S.C. 499a *et seq.* 2
7 U.S.C. 499a(b)(9) 2, 8
7 U.S.C. 499c(a) 2
7 U.S.C. 499h(b) 2
7 U.S.C. 499h(b)(3) 2, 8
28 U.S.C. 2342 4
7 C.F.R.:
Section 1.141(g)(6) 6, 7, 10
Section 1.145(i) 4
Section 2.35 4

Miscellaneous:

29 Am. Jur. 2d *Evidence* (1967) 6
21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* (Supp. 1996) 6-7

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1675

JOHN J. CONFORTI, d/b/a C & C PRODUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 69 F.3d 897. The revised opinion of the court of appeals (Pet. App. 1-11) is reported at 74 F.3d 838. The decision and order of the Judicial Officer of the Department of Agriculture (Pet. App. 12-71) is reported at 54 Agric. Dec. 649.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1995. A petition for rehearing was denied on January 18, 1996. The petition for a writ of certiorari was filed on April 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Perishable Agricultural Commodities Act of 1930 (PACA), 7 U.S.C. 499a *et seq.*, requires wholesale produce dealers to obtain licenses from the United States Department of Agriculture (USDA). See 7 U.S.C. 499c(a). A PACA licensee must obtain approval from USDA before employing an individual who is "responsibly connected" to a corporation that has failed to satisfy USDA reparation orders. 7 U.S.C. 499h(b)(3). At the time of the events in question, PACA defined an individual as "responsibly connected" to such a corporation if he or she served as an officer or director of the corporation, or held more than ten percent of its outstanding stock. 7 U.S.C. 499a(b)(9).[1] USDA is authorized to approve a licensee's employment of a responsibly connected individual "if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary [of Agriculture]." 7 U.S.C. 499h(b).

2. Petitioner operates C & C Produce, a produce dealership licensed under PACA. Pet. App. 2. In June, 1993, petitioner hired Joseph Cali to work for C & C Produce. *Ibid.* On June 24, 1993, petitioner received a letter from USDA informing him that Cali was "responsibly connected" to Royal Fruit Co., a corporation with several outstanding reparation orders. *Ibid.* The letter stated that petitioner could not employ Cali after July 24, 1993, unless petitioner posted a bond. The required bond was later set at

---

[1] In 1995, the definition of "responsibly connected" persons under PACA was amended. See Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 430 (to be codified at 7 U.S.C. 499a(b)(9)) (discussed at pages 11-12, *infra*).

$100,000. *Ibid.* Neither petitioner nor Cali disputed Cali's "responsibly connected" status.

Petitioner did not terminate Cali's employment on or before July 24; nor did petitioner post the required bond. Cali continued to work for petitioner until November 19, 1993. In the meantime, USDA warned petitioner at least five times that Cali's continued employment could result in suspension or revocation of petitioner's PACA license. Pet. App. 3; Gov't C.A. Br. 6. Although petitioner made good faith attempts to secure the required bond throughout the period of Cali's employment (Pet. App. 2-3), petitioner failed to secure the bond. Petitioner was on notice that securing a bond was a "prerequisite" to his firm's employment of Cali. Gov't C.A. Br. 6.

3. Three months after petitioner terminated Cali, USDA filed an administrative complaint against petitioner, seeking to revoke his PACA license due to his unlawful employment of Cali. Pet. App. 3. After a hearing, an administrative law judge (ALJ) found that petitioner had violated PACA and suspended his license for 30 days. *Ibid.* The ALJ found that Cali had been "responsibly connected" to Royal Fruit. *Id.* at 20-21. That finding was substantially supported by evidence in the administrative record, including several letters from USDA to Royal Fruit and to petitioner. Gov't C.A. Br. 24-26. Petitioner never disputed Cali's "responsibly connected" status before the ALJ, and never objected to the admissibility of the letters as proof of that status. In fact, petitioner's counsel at the administrative hearing conceded that "Mr. Cali was determined to be somebody responsibly connected with Royal Fruit Co." *Id.* at 28.

4. Both USDA and petitioner appealed the ALJ's decision to the USDA Judicial Officer (JO). The JO

affirmed the ALJ's holding that petitioner had violated PACA, and increased the term of suspension to 90 days. Pet. App. 3. Pursuant to 5 U.S.C. 556(e) and 7 C.F.R. 1.145(i), the JO took official notice of several documents concerning Cali that had been filed in two other administrative proceedings. See Pet. App. 72-73. The officially noticed documents were: (i) a Decision and Order filed on July 26, 1994, in *In re Midland Banana & Tomato Co.*, No. D-93-548 (Agric. July 26, 1994), and *In re Royal Fruit Co.*, No. D-93-549 (Agric. July 26, 1994) (Pet. App. 74-113); (ii) the Complaint filed by USDA in *Royal Fruit* (*id.* at 114-123); and (iii) a transcript of a portion of testimony from the *Royal Fruit* hearing (*id.* at 124-126). Those documents lent additional support to the finding that Cali was "responsibly connected" with Royal Fruit. *Id.* at 76, 78-79, 93.

In accordance with 5 U.S.C. 556(e), the JO gave petitioner an opportunity to challenge the information contained in the officially noticed documents. See Pet. App. 72-73. Petitioner, again, did not dispute that Cali was responsibly connected to Royal Fruit. Instead, petitioner filed an "Objection to Order Taking Official Notice," which challenged the propriety of the JO's use of official notice. *Id.* at 127-129.

5. Petitioner sought review of the JO's order, which was the final decision of the Secretary of Agriculture, in the court of appeals. 28 U.S.C. 2342; 7 C.F.R. 2.35. The court of appeals upheld the finding that petitioner violated PACA, but reinstated the 30-day suspension imposed by the ALJ. Pet. App. 1, 11.

The court of appeals rejected petitioner's assertion that "the record lack[ed] evidence indicating that Cali met PACA's definition of a responsibly connected individual." Pet. App. 4. The court noted that the JO

had taken official notice of the *Royal Fruit* decision, in which "the ALJ found that Cali was the President and a director of Royal Fruit and that he held 50 percent of the company's stock." *Ibid.* The court held that both USDA regulations and agency rules of practice permit the use of official notice under these circumstances. The court further noted that the JO had given petitioner the "required opportunity to object to the order taking official notice." *Id.* at 5 (citing 5 U.S.C. 556(e)).

The court of appeals also rejected petitioner's arguments that (i) the JO was required to conduct a special hearing on the question of Cali's connection to Royal Fruit (Pet. App. 4); (ii) Cali was not responsibly connected to Royal Fruit because he played only a "minor role" in the management of that company (*id.* at 5); and (iii) petitioner did not violate PACA because the USDA led him to believe that he could continue to employ Cali while he made a good faith effort to obtain a bond (*id.* at 6-7).

ARGUMENT

1. Petitioner's primary contention before this Court is that the court of appeals misapplied the doctrine of official notice, thus allegedly violating petitioner's rights under the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment. Although the court of appeals appears to have erred in its reliance on official notice, that error was harmless and does not warrant this Court's review.

This Court has recognized that administrative agencies have considerable discretion to allow the introduction of hearsay evidence in administrative proceedings. See *Richardson* v. *Perales*, 402 U.S. 389

(1971). Here, however, there is an applicable USDA regulation, 7 C.F.R. 1.141(g)(6), which permits a JO to take official notice, *inter alia*, of "such matters as are judicially noticed by the courts of the United States."[2]

As a general rule, "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V American Queen* v. *San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (citing 29 Am. Jur. 2d *Evidence* § 58 (1967)). "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mut. Ins. Co.* v. *Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (citation omitted); see also *Dayco Corp.* v. *FTC*, 362 F.2d 180, 186 (6th Cir. 1966) ("It needs no argument to demonstrate that agencies may not take notice of the 'litigation facts' involved in a particular case; to do so would be to shift the burden of proof and make a mockery of the hearing procedure.") (citation omitted); 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5106 (Supp. 1996) ("If it were permissible

---

[2] In full, 7 C.F.R. 1.141(g)(6) provides:

Official notice. Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

for a court to take judicial notice of a fact because it has been found true in some other action, the doctrine of collateral estoppel would be superfluous."). Thus, the court of appeals apparently erred when it held that findings of fact from the *Royal Fruit* proceedings—in which it was determined that Cali was the President and a director of Royal Fruit, and that he held 50% of the company's stock—justified the JO's conclusion that Cali was responsibly connected to Royal Fruit. Pet. App. 4.[3]

Although the court of appeals' reliance on official notice appears to have been erroneous in light of the applicable USDA regulation, that error was harmless. In *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 530 (1946), this Court noted that harmless error analysis applies to an agency's erroneous use of official notice to rely on matters outside the adminstrative record. The Court declined to "make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings," and held that "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." *Ibid.*; see also *American Trucking Ass'ns* v. *Frisco Transp. Co.*, 358 U.S. 133, 144 (1958). Here, abundant other evidence supported the finding that Cali was responsibly connected to Royal Fruit. Petitioner was, moreover, given an opportunity to

---

[3] The cases cited by the court of appeals, *Hart* v. *Commissioner*, 730 F.2d 1206, 1207 n.4 (8th Cir. 1984), and *United States* v. *Jackson*, 640 F.2d 614, 617 (8th Cir.), cert. denied, 454 U.S. 1057 (1981), do not support use of official notice to adopt factual findings from another proceeding.

refute the officially noticed facts. Thus, petitioner was not prejudiced by the court of appeals' error.

The critical issue before USDA and the court of appeals was whether, in employing Cali, petitioner unlawfully employed an individual who was "responsibly connected" to a corporation that had failed to satisfy USDA reparation orders. 7 U.S.C. 499h(b)(3). The statute defines a person as "responsibly connected" to a corporation if he serves as an officer or director of the corporation, or if he holds more than ten percent of its outstanding stock. 7 U.S.C. 499a(b)(9).

Aside from the officially noticed material, the administrative record in this case contains ample support for the finding that Cali was "responsibly connected" to Royal Fruit, a company subject to outstanding reparation orders. By letter dated May 18, 1993, USDA had informed Royal Fruit of its ineligibility to obtain a new PACA license due to its nonpayment of a reparation award. That letter, which was introduced at petitioner's initial hearing by stipulation of counsel, stated:

> [T]he officers, directors, or holders of more than 10 percent of the stock in your firm cannot be employed by or affiliated in any capacity with any other licensee under the Act without the approval of the Secretary of Agriculture and the posting of a suitable surety bond. Our records show Joseph S. Cali, Beverly Heimann, and Jeffrey B. Heimann to have held these positions. As officers, directors, and/or stockholders, it has been determined pursuant to Section 47.49, of the enclosed Rules of Practice, that they were responsibly connected

> with Royal Fruit Co., Inc., at the time of the violation.

Gov't C.A. Br. 25. In addition, the record contains several other letters, sent to petitioner by USDA, that state that "[t]he Department's records show Mr. Cali was responsibly connected with Royal Fruit Co., Inc. as the president and stockholder during the period of violations." *Id.* at 24-26. Petitioner did not dispute the admissibility or the accuracy of those letters as proof of Cali's "responsibly connected" status. The additional documents admitted by official notice were not made part of the record until the subsequent proceeding before the JO, after the ALJ had ruled against petitioner. Those documents lent further support to the finding that Cali was responsibly connected, but were not necessary to establish Cali's status. Indeed, petitioner concedes that "[n]either the [JO] nor the ALJ in Petitioner's case relied on the Royal Fruit/Midland Banana findings to conclude that Cali was responsibly connected." Pet. 11-12.

It is also relevant that petitioner was given an opportunity to contest the accuracy of the material that was officially noticed. The JO's Order Taking Official Notice afforded petitioner ten days to "show the contrary," as required by the APA. Pet. App. 72; 5 U.S.C. 556(e).[4] By giving petitioner an "opportunity

---

[4] The pertinent section of the APA, 5 U.S.C. 556(e), provides:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

to show the contrary," the JO also complied with 7 C.F.R. 1.141(g)(6), which requires that "the parties shall be given adequate opportunity to show that such facts are erroneously noticed." Petitioner never offered any evidence to contradict the finding that Cali was responsibly connected with Royal Fruit. Instead, petitioner filed an "Objection to Order Taking Official Notice" (Pet. App. 127-130), which challenged only the propriety of the JO's use of official notice under the circumstances.

Petitioner's allegation that he was "confronted with facts used against him after a decision was rendered without an opportunity to challenge the facts" (Pet. 12) is incorrect. Petitioner's "Objection to Order Taking Official Notice" indicates that petitioner was indeed aware of the facts to be noticed; his objection protests the potential admission of "an adjudicative fact that [is] disputed and critical to the outcome of the case." Pet. App. 130. Moreover, the only issue in this case was whether petitioner had employed an individual who was responsibly connected to a corporation with outstanding USDA reparation orders, and the officially noticed documents obviously established that Cali was so connected. Petitioner therefore plainly had notice of the material facts and an opportunity to rebut those facts. See, *e.g.*, *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 (1974); *American Trucking Ass'ns* v. *Frisco Transp. Co.*, *supra*.

2. Petitioner asserts that "the Judicial Officer also admitted into the record another document which he had not referenced in the Order Taking Official Notice—part of the agency's brief in the Royal Fruit/Midland Banana cases." Pet. 10 (citing Pet.

App. 53-56). The JO's decision, however, clearly identifies the brief "admitted" as one filed in the instant case, not in *Royal Fruit/Midland Banana*. Thus, there is no merit to petitioner's allegation of a "strange twist" based on the admission of "a brief that had never been referenced in the Conforti case." Pet. 10-11.

3. Petitioner contends that "there is no finding that Cali [was responsibly connected with Royal Fruit] in the relevant year of 1993 when Royal Fruit's PACA license was suspended for failing to pay reparation awards." Pet. 12. Petitioner has waived that claim because he did not raise it before the ALJ or before the JO. In any event, evidence in the record establishes that Cali was responsibly connected with Royal Fruit "at the time of the violation." Gov't C.A. Br. 25.

4. Finally, petitioner indirectly suggests that his case warrants reconsideration because of an intervening amendment in the statutory definition of "responsibly connected" persons. Pet. 13. At the time of petitioner's initial hearing, governing Eighth Circuit precedent required the application of a "per se" rule under which all officers, directors and ten-percent shareholders of a corporation were automatically deemed "responsibly connected." See *Pupillo* v. *United States*, 755 F.2d 638, 643 (8th Cir. 1985). On November 15, 1995, the PACA provision defining "responsibly connected" persons was amended to adopt a "rebuttable presumption" rule, under which an officer, director or ten-percent shareholder could avoid "responsibly connected" status by proving, by a preponderance of the evidence, that he or she had no "active[ ] involve[ment] in the activities resulting in a violation of [PACA]." Perishable Agricultural Com-

modities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 430 (to be codified at 7 U.S.C. 499a(b)(9)). Petitioner is not entitled to reconsideration under the new standard, however, because the 1995 amendments to PACA were adopted prospectively. See *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1500-1501 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
JOHN S. KOPPEL
Attorneys

JULY 1996